

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

HENRY BENITEZ,

Plaintiff,

**9:04-CV-423
(NAM/RFT)**

vs.

J. LOCASTRO, Lt.; Lt. MILLER; D. SELSKY, Dir. of SHU; J. BURNS; Sgt. MARTENS; C. GUMMERSON, Capt.; J. ROURKE, Capt.; M. BRADT; C. PARMITER; J. BURGE; T. EAGEN, Dir. of Corrections; J. WILKINSON; R. SMITH; C.O. BARANSKA; R.N.S. LENNOX; J.PORTEN; J. McNAMARA; JOHN DOES 1-6, C.O.s; R. SMITH, R.N.; W. CHILSON, Sgt.; Sergeant COLON; R. CONSIDINE, C.O.; Psych. KNEELAND; V. KONECNY; C.O. CLARKE; S. CROZIER; JOHN DOE, XII, C.O.; CHO WOLCZYK; Sergeant SMITH; C.O. MILLER; S. YORKEY, Sgt.; Sgt. MURLEY; Lt. EASTERBROOK; C.O. LOOMIS; T. QUINN; Sgt. CHRISTOPHER; C.O. ROUX; C.O. LEONELLO; C.O. MEYERS; M. KESSEL; G. MACCUCCI, C.O.; E. AMBERMAN; and M. MELINDEZ,

Defendants.

APPEARANCES:

**HENRY BENITEZ
97-A-2553
Upstate Correctional Facility
PO Box 2001
Malone, New York 12953
Plaintiff, *pro se***

**Hon Andrew M. Cuomo, Attorney General of the State of New York State
Ed. J. Thompson, Assistant Attorney General
615 Erie Boulevard West, Suite 102
Syracuse, New York 13204**

Hon. Norman A. Mordue, Chief U.S. District Judge:

MEMORANDUM-DECISION AND ORDER

Plaintiff, an inmate in the custody of the New York State Department of Correctional

Services (“DOCS”), brought this action under 42 U.S.C. § 1983. The amended complaint (Dkt. No. 5) alleges various constitutional deprivations in connection with several incidents at Auburn Correctional Facility in 2001 and 2002. Defendants moved for summary judgment dismissing the action (Dkt. No. 118). Upon referral pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 72.3(c), United States Magistrate Judge Randolph F. Treece issued a thorough Report and Recommendation (Dkt. No. 139) recommending that summary judgment be granted in part and denied in part. Specifically, regarding the Eighth Amendment excessive force/medical indifference claims stemming from the events of July 9, 2002, Magistrate Judge Treece finds questions of fact regarding exhaustion and recommends as follows: that the claims against Nurse R. Smith be dismissed; that summary judgment be denied as to all other July 9, 2002 excessive force claims (*i.e.*, the claims against J. Rourke and the John Doe defendants); and that plaintiff be granted leave to file a second amended complaint to substitute named defendants for the John Doe defendants. Magistrate Judge Treece recommends dismissal of plaintiff’s Eighth Amendment conditions-of-confinement claims relative to the following: deprivation orders issued in November 2001 and July 2002; poor cell ventilation due to cell shield; denial of meals; and injuries from tight shackles and cuffs. Magistrate Judge Treece further recommends dismissal of plaintiff’s claims that the deprivation, restraint, and cell shield orders were retaliatory. In addition, Magistrate Judge Treece recommends dismissal of plaintiff’s due process claims regarding the disciplinary hearings of November 21, 2001, July 11, 2002, and July 16, 2002.

Plaintiff filed an objection (Dkt. No. 140) to certain aspects of the Report and Recommendation. As to all other portions of the Report and Recommendation, by failing to object, plaintiff waives further judicial review. *See Roldan v. Racette*, 984 F.2d 85, 89 (2d Cir.

1993). Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court conducts a *de novo* review of the portions of the Report and Recommendation to which plaintiff objects, specifically the recommendations that the Court dismiss plaintiff's medical indifference claim against Nurse R. Smith stemming from the July 9, 2002 incident, and his Eighth Amendment claims stemming from the deprivation orders issued in November 2001 and July 2002. Upon *de novo* review, the Court agrees with Magistrate Judge Treen's factual summary, analysis, and recommendation regarding these issues. Accordingly, the Court accepts the Report and Recommendation in its entirety.

It is therefore

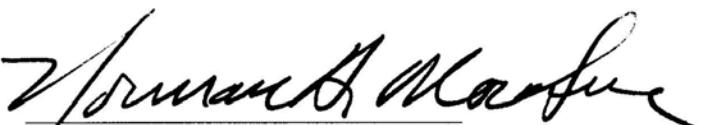
ORDERED that United States Magistrate Judge Randolph F. Treen's Report and Recommendation (Dkt. No. 139) is accepted in its entirety; and it is further

ORDERED that defendants' motion for summary judgment (Dkt. No. 118) is granted to the extent of dismissing all claims except the Eighth Amendment excessive force claims against Rourke and John Does Nos. 1-6 stemming from the events of July 9, 2002; and it is further

ORDERED that plaintiff is granted 30 days from the date of this Memorandum-Decision and Order to file a motion to amend his amended complaint in order to identify John Does Nos. 1-6, which shall include a proposed second amended complaint attached thereto.

IT IS SO ORDERED.

January 29, 2010
Syracuse, New York



Norman A. Mordue
Chief United States District Court Judge